LEVINE, BLASZAK, BLOCK & BOOTHBY
1300 CONNECTICUT AVENUE, NW
SUITE 500
WASHINGTON, D.C. 20036-1703
(202) 223-4980
FAX (202) 223-0833

March 26, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW.
Washington, D.C. 20554

Re: In the Matter of Implementation of Section 273
of the Communications Act as amended by the
Telecommunications Act of 1996, CC Docket No. 96-254

Dear Mr. Caton:

Pursuant to the Notice of Proposed Rulemaking in the above captioned matter, enclosed please find an original and 11 copies of the Reply Comments of the Information Technology Industry Council. Please date stamp the additional copy and return it with our messenger.

If you have any questions regarding this filing, please do not hesitate to call.

Sincerely,

Janine F. Goodman

278/01/Safegrds/LTR 273 Reply

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Implementation of Section 273 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996	CC Docket 96-254

REPLY COMMENTS OF THE INFORMATION TECHNOLOGY INDUSTRY COUNCIL

Fiona J. Branton
Director, Government Relations
and Regulatory Counsel
Information Technology Industry Council
1250 Eye Street, N.W., Suite 200
Washington, DC 20005
(202)626-5751

Colleen Boothby
Janine F. Goodman
Levine, Blaszak, Block & Boothby
1300 Connecticut Avenue, N.W.
Suite 500
Washington, DC 20036-1703
(202)223-4980

March 26, 1997

Summary

As ITI emphasized in its Comments, the Commission's Section 273 rules must be flexible enough to facilitate competition and accommodate the practical needs of manufacturing enterprises but sufficiently specific to ensure compliance with both the language and intent of Section 273. Some Commenters have urged the Commission to adopt requirements that are inconsistent with the statutory requirements, and which the Commission should reject.

Some Commenters argue that Section 273 applies to only those BOCs who are authorized to manufacture or are in fact engaged in manufacturing. This interpretation vitiates both the statutory language and underlying Congressional intent of Section 273. Competition in equipment manufacturing markets will be skewed if BOCs are permitted to give preferential treatment to individual manufacturers, regardless of whether the BOC has itself entered the market.

The Commission should reject arguments that the non-discriminatory disclosure and procurement requirements of Section 273 do not apply to collaborations permitted under Section 273(b). Section 273(b) only exempts collaborations from the authorization requirement in Section 273(a). Thus, information disclosed *to* a manufacturer during collaboration must be disclosed to all manufacturers.

The Commission should also reject claims that the Section 273 disclosure and timing requirements are "subsumed" under the regulations adopted by the Commission pursuant to Section 251 of the Act. The information specified in

Section 251 which must be disclosed by incumbent local exchange carriers differs from the information specified in Section 273. The Commission also should reject arguments that disclosure should be restricted to interface-related information. Such a restriction ignores the information manufacturers will need to produce equipment compatible with emerging network technologies.

ITI continues to support a flexible standard for the timing of BOC disclosure in compliance with Section 273, coupled with procedural remedies for obtaining additional information if disclosure is inadequate. Manufacturers must be given an opportunity to seek additional information from a BOC and to receive a response within a defined time period. These procedural remedies must accompany any flexibility in the timing requirements for Section 273 disclosure to ensure that the flexibility is not used to anti-competitive effect.

There should be no exemption for field testing under the disclosure rules. Section 273 does not establish one and the Commission should not create one. Such an exemption would permit selective disclosure of protocols and technical requirements which would undercut the pro-competitive policies underlying Section 273. Section 273 applies only to information disclosed *to* a manufacturer by a BOC, however; nothing in the section requires disclosure of information received *from* a manufacturer during a field test.

Finally, the Commission should clearly identify the arrangements that do not qualify as permissible collaborations under Section 273(b). In particular, joint funding, joint ventures, and investments by a BOC in a manufacturing entity should not be considered mere collaborations. These arrangements create

competitive concerns no different from those which prompted the separate affiliate requirements in Section 272, and therefore should not be permitted in advance of a BOC's compliance with that section.

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REPLY COMMENTS OF THE
INFORMATION TECHNOLOGY INDUSTRY COUNCIL

INTRODUCTION

The Information Technology Industry Council ("ITI"), whose members include the nation's leading vendors of computers, computing devices, office equipment and information services, submits the following Reply Comments in response to the Notice of Proposed Rulemaking ("NPRM")[1] in the docket captioned above.

The Commission's implementation of Section 273 of the Telecommunications Act of 1996 ("Act")[2] must take into account the technological convergence of IT equipment and traditional telephony equipment

[1] *Implementation of Section 273 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996*, CC Docket No. 96-254, *Notice of Proposed Rulemaking,* FCC 96-472 (rel. December 11, 1996).

[2] *Communications Act of 1934 as amended* by *The Telecommunications Act of 1996,* 47 U.S.C. §§ 151 *et seq.*

(which includes both telecommunications equipment ("TE") and customer premises equipment ("CPE")). That convergence complicates any assessment of the competitive issues which may arise as a result of BOC entry into the manufacturing markets for TE and CPE. The evolving state of the IT marketplace also complicates the specification of precise requirements for information disclosure, both in terms of degree and timing, which would be consistent with the underlying purpose of Section 273.

For these reasons, ITI urged in its Comments that the Commission adopt flexible Section 273 rules that will both facilitate competition and ensure a level competitive playing field. In particular, ITI urged the Commission to adopt rules that: require disclosure of information regarding protocols and technical requirements "at the highest level of disaggregation feasible"[3]; provide manufacturers with an opportunity to seek additional information; and grant the BOCs flexibility as to the timing of their compliance with Section 273 disclosure requirements while preventing anti-competitive abuse of this flexibility through procedural remedies that ensure compliance.

Several of the Comments filed in this docket raised issues relevant to ITI's approach and are discussed in the following paragraphs.

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[3] *NPRM* ¶ 24.

I. THE SECTION 273 DISCLOSURE AND NON-DISCRIMINATORY PROCUREMENT REQUIREMENTS APPLY TO ALL BOCS

Several Commenters argued that the Section 273(c) disclosure restrictions and 273(e) procurement requirements apply only to BOCs who either are authorized to manufacture or are actually engaged in manufacturing equipment.[4] They argue that the network disclosure requirements set forth in the *Second Interconnection Order*[5] adequately address any concerns relating to non-manufacturing BOCs, and the "potential ills" about which the Commission is concerned are "nonexistent" with respect to such BOCs.[6] SBC argues that the procurement requirements do not apply to non-manufacturing BOCs because Congress's "only reason" for imposing such requirements was to "remove [the BOCs'] perceived incentive to cross-subsidize the prices of, or otherwise to discriminate in favor of, affiliate-manufactured equipment with revenues from regulated services" and that the Commission's proposal to apply Section 273(e) to all BOCs "missed the mark."[7]

These arguments misstate both the language and purpose of Section 273. The disclosure and procurement requirements in Section 273 apply

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[4] Only U.S. West supported the application of Section 273(c) and (e) requirements to BOCs authorized to manufacture as well as those actually engaged in manufacturing. U.S. West Comments at 18 & 24.

[5] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Second Report and Memorandum Opinion and Order,* 11 FCC Rcd 15499 (1996) (the "*Second Interconnection Order*").

[6] SBC Communications Inc. (SBC) Comments at 8; BellSouth Comments at 9-10.

[7] SBC Comments at 19.

by their terms to "[e]ach" or "a" Bell Operating company,[8] without limitation to those companies who are engaged in manufacturing or authorized to do so. In addition, as the Commission notes in the *NPRM,* the purpose of the section is to "facilitate BOC entry into manufacturing while preserving the competitive nature" of the TE and CPE markets.[9] Competition in the TE and CPE markets would be adversely affected if the BOCs were permitted to give preferential treatment to a particular manufacturer, whether or not the discriminating BOC has itself begun manufacturing or has been authorized to do so.

The Commenters' interpretation would thus vitiate both the statutory language of Section 273 and the Congressional intent underlying it; the interpretation would permit BOCs to skew competition in equipment markets by disclosing to or procuring from one manufacturer on a selective basis. As TIA notes in its Comments, this interpretation would create a backdoor means for non-manufacturing BOCs to engage in discriminatory activities, allowing them to favor non-affiliate manufacturers in whom they may have a financial interest.[10]

II. SECTION 273 REQUIREMENTS APPLY TO COLLABORATIONS WITH UNAFFILIATED MANUFACTURERS BUT DO NOT NULLIFY PROTECTIONS FOR THE PROPRIETARY INFORMATION OF UNAFFILIATED MANUFACTURERS

At least one commenter argued that the disclosure/filing requirements and non-discriminatory procurement rules in Section 273 do not apply to

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8 47 U.S.C. §§ 273(c)(1) & (2) and (e)(1) & (2)

9 *NPRM* ¶ 4.

collaborations with unaffiliated manufacturers.[11] The comment reasoned that Section 273 is concerned primarily with the BOCs' relationships with their affiliates, and that placing restrictions on BOC collaborations with non-affiliated companies is inconsistent with Congress's decision to allow "close collaboration."[12]

This interpretation is inconsistent with the provisions of Section 273. Section 273(b) refers to collaborations, but only to exempt them from the authorization requirement in Section 273(a). (Section 273(a) would otherwise prohibit collaborations until such time as the BOC satisfies the requirements for interLATA entry in Section 271(d).) Section 273 contains no language exempting collaborations from any other requirements of the section. Accordingly, the Commission should reject attempts to read additional exemptions into the section.

ITI argued in its comments that the Commission should, however, clarify the applicability of Section 273's disclosure requirements to collaborations between a BOC and an equipment manufacturer. In particular, ITI urged the Commission to clarify that Section 273 does *not* require a BOC to disclose publicly otherwise proprietary information that the BOC receives *from* the equipment manufacturer. As ITI noted in its comments, protection of the manufacturer's proprietary information is necessary to preserve competition in

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10 Telecommunications Industry Association (TIA) Comments at 20 & 46.

11 *See* Ameritech Comments at 21-23.

12 *Id.*

equipment markets. The current industry practice among manufacturers has been to protect such data (and share it as necessary, particularly in the case of proprietary TE data needed by CPE or IT equipment manufacturers to keep their equipment current) through non-disclosure agreements. This practice has successfully maintained the proper balance between preserving proprietary or confidential information and disclosing the information necessary to maintain a pro-competitive market. The Commission's rules should not disturb this practice.

III. THE DISCLOSURE AND FILING REQUIREMENTS IN SECTION 251 ARE INSUFFICIENT FOR PURPOSES OF SECTION 273

Several Commenters argue that the Section 251 disclosure requirements established by the *Second Interconnection Order* "subsume" the Section 273 disclosure requirements, and therefore the Commission need not develop additional rules to protect TE and CPE manufacturers.[13] Because of the significant differences between the sections, both in terms of content and applicability, the Commission should reject these arguments.

Section 251 requires disclosure of (i) changes in the "information necessary for the transmission and routing of services" using the BOC's facilities or networks; or (ii) changes that would impact the interoperability of the facilities or networks.[14] By contrast, Section 273(c)(1) directs the Commission to establish rules requiring a BOC to disclose "full and complete information with respect to

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[13] *See* Ameritech Comments at 18-21; U.S. West Comments at 18-20; Pacific Telesis Comments at 12-13; Bell Atlantic/NYNEX Comments at 8-10; BellSouth Comments at 8; SBC Comments at 10-11.

the protocols and technical requirements for connection and use of its telephone exchange service facilities," including changes or planned changes thereto.[15]

Pursuant to Section 251(c)(5), the Commission adopted rules which require the disclosure of "references to technical specifications, protocols and standards regarding transmission, signaling, routing and facility assignment *as well as* references to technical standards that would be applicable to any new technologies or equipment, or that may otherwise affect interconnection."[16] Thus, the Commission's Section 251 disclosure rules distinguish between, on the one hand, new technologies, equipment, or standards that affect interconnection, and, on the other hand, transmission, signaling, routing and facility assignments. The BOCs are required to disclose only standards -- and *not* technical specifications or protocols -- regarding new technologies and equipment or those affecting interconnection. Section 273, on the other hand, requires the disclosure of protocols and technical requirements for connection with and use of local exchange facilities. Thus, the rules implementing Section 251 would not capture the full scope of the disclosure required under Section 273.

The Commission also should reject Bellcore's recommendation to restrict disclosure to interface-related information.[17] Information other than interface-related information is not only required to satisfy the statutory standard but, as

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14 47 U.S.C. § 251(c)(5).

15 47 U.S.C. § 251(c)(1).

16 *Second Interconnection Order* at ¶ 188 (emphasis added); 47 C.F.R. § 51.327.

17 Bellcore comments at 11-12.

networks evolve and as switch-based or signaling-based network intelligence predominates, such information will be crucial to equipment that capitalizes on emerging information technologies and network functions.[18] Bellcore's restrictive approach to information disclosure would deny manufacturers the information they are likely to need for interoperability as network features and functions continue their migration in the network to signaling or switching platforms.

In its comments, ITI endorsed the Commission's recommendation to require disclosure at the "highest level of disaggregation feasible." ITI continues to believe that this high level of disclosure is necessary to ensure a competitive market on a going-forward basis, and is consistent with the 1996 Act's mandate that BOCs disclose "full and complete" information.[19]

IV. THE COMMISSION SHOULD ADOPT FLEXIBLE TIMING RULES ENFORCED BY PROCEDURAL PROTECTIONS FOR MANUFACTURERS SEEKING ADDITIONAL INFORMATION

Many commenting parties endorsed the Section 251 rules on the timing of disclosure and filing as appropriate under Section 273. These rules provide for disclosure at the "make/buy" point, but no later than twelve months prior to the implementation of a network change. If planned changes can be implemented within twelve months of the make/buy point, disclosure must be made at the make/buy point but no later than six months before implementation.

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[18] *Intelligent Networks,* CC Dkt. No. 91-346, *Notice of Inquiry,* 6 FCC Rcd 7256 (1991), *Notice of Proposed Rulemaking,* 8 FCC Rcd 6813 (1993), *Order by the Chief, Policy and Program Planning Division,* 11 FCC Rcd 1226 (1995).

[19] *Id.*

Under Section 251, the "make/buy" point is defined as "the time at which an incumbent LEC decides to make for itself, or to procure from another entity, any product the design of which affects or relies on a new or changed network interface," or, where an ILEC's changes do not require the making or procurement of a product, the point when the ILEC "makes a definite decision to implement a network change."[20]

The utility of the make/buy standard is not clear for purposes of Section 273(c) disclosure, particularly with respect to CPE which will not be purchased by BOCs for their use in combination with a new or changed network interface in the same manner as their purchase and use of TE. In addition, the specification of a single point in time for disclosure of technical information and protocols could be inconsistent with the widely varying product design and manufacturing cycles typical of the CPE marketplace. Accordingly, ITI argued in its Comments that the Commission should establish a flexible Section 273(c) disclosure schedule that accommodates differences among products and manufacturing needs.

As described in ITI's comments, BOC flexibility with regard to disclosure time frames must be paired with procedural mechanisms that give manufacturers an adequate opportunity to seek additional information when BOC disclosure is incomplete. The Commission has already recognized that such opportunities create useful compliance incentives. The short-term notice rules in Section

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[20] 47 C.F.R. § 51.331(b).

51.333 of the Commission's rules require that changes which must be disclosed under Section 251, and which can be implemented within six months of the make/buy point, must be disclosed to affected service providers through short-term public notice. The rule outlines a detailed process by which manufacturers can object to the public notice and request additional information.

The Commission's rules pursuant to Section 273 should establish a similar mechanism for manufacturers to obtain more information when the initial BOC disclosure is inadequate, although, unlike in Section 51.333, this mechanism should not be limited to only short term notice filings. Under the procedure outlined in ITI's Comments, manufacturers would seek additional information directly from the BOC, and obtain a response within a specified time, before escalating any dispute to the Commission.[21] Where the parties do reach an impasse with respect to the content or timing of disclosure, ITI endorses a more formal process, as described in its comments.

V. SECTION 273(c) REQUIRES DISCLOSURE OF PROTOCOLS AND TECHNICAL REQUIREMENTS PROVIDED TO MANUFACTURERS DURING EQUIPMENT TRIALS

Commenters generally favored exempting bona fide equipment trials from the disclosure requirements. ITI agrees with TIA that the Commission should not permit Section 273 to be used to nullify an equipment manufacturer's proprietary

[21] As noted in ITI's comments, this opportunity to seek additional information may require a BOC to postpone implementation if its response is delayed.

information rights during the course of a field test on a BOC network.[22] Similarly, however, field testing of equipment should not be used as a means of evading the Section 273(c) disclosure requirements.

Section 273(c) requires the Commission to prescribe whatever regulations are "necessary to ensure that manufacturers have access to the information . . . that a [BOC] makes available to *any* manufacturing affiliate or *any* unaffiliated manufacturer."[23] The Section establishes no exemption for field testing. If the Commission exempted equipment trials from the Section 273(c) disclosure requirements, such trials could result in the selective disclosure of network information, thus negating the competitive protections of Section 273. Manufacturers who participate in field trials could obtain information regarding anticipated network changes or other data within the scope of Section 273(c) that would enable them to produce and distribute equipment that capitalizes on the change in advance of their competitors. Such a result undercuts the purpose of Section 273, which is to preclude selective disclosure by the BOCs that would impede the robust competition in equipment markets.

To the extent that a *manufacturer* discloses information to the BOC during a field test, however, the disclosure would not fall within the scope of Section 273 and the Commission's rules implementing that section would not be triggered. As stated in ITI's Comments, the Commission's rules

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22 TIA Comments at 23, note 53.

23 47 U.S.C. § 273(c)(3) (emphasis added).

> must distinguish carefully between information regarding a BOC's *network* and the information regarding a collaborator's ... *equipment* . ... Information that is provided by a BOC to a partner about the BOC's *network* and its capabilities for interacting with equipment, should be presumptively classified as disclosable. Simultaneously, a BOC should be required to protect proprietary information obtained from unaffiliated collaborators, royalty agreement partners, or entities with or through whom the BOC is engaging in research relating to manufacturing and to exclude such proprietary information when the BOC files its Section 273 data with the Commission.

VI. "CLOSE COLLABORATION" SHOULD NOT BE CONSTRUED TO INCLUDE JOINT VENTURES, FUNDING, OR INVESTING BY A BOC WITH A MANUFACTURER

In response to the Commission's request for comment on the types of activities that should constitute "close collaboration" under Section 273(b),[24] SBC urged the Commission to define "close collaboration" to include: "(1) conception of features and functionalities; (2) specification development or refinement; (3) project oversight and management; (4) joint testing; (5) funding development efforts; (6) creating and participating in joint ventures with one or more vendors; and (7) investing in manufacturing companies."

"Close collaboration" can refer to a variety of possible arrangements between the BOCs and other entities. Any definition of "collaboration" adopted by the Commission should not prevent BOCs and manufacturers from entering into collaborative arrangements that would produce innovative products or services beneficial to consumers and competition. The meaning of "collaboration" will also be refined over time as the Commission applies it to

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[24] *NPRM* ¶ 11.

particular arrangements between companies. At this stage in the development of the Commission's regulatory regime, the information of greatest use to potential collaborators is a clear specification of those activities that do *not* constitute permissible collaboration.

In its comments, SBC identified three types of arrangements that do not reasonably qualify as mere collaboration. In particular, SBC argued that funding development efforts, creating and participating in joint ventures with one or more vendors, and investing in manufacturing companies should be considered collaborations. The affiliations created by these investment activities raise competitive concerns no different from those which prompted the separate affiliate requirements in Section 272. The collaboration exception cannot be interpreted to nullify Section 272. The Commission should therefore find that these activities are outside the parameters of Section 273(b)(1).[25]

CONCLUSION

The Section 273 rules adopted by the Commission should facilitate continued growth and innovation in the vigorously competitive equipment market. The Commission's challenge is to develop rules that are flexible enough to serve the needs of a competitive marketplace and enhance consumer welfare but

[25] Other activities included in SBC's definition may or may not constitute "close collaboration" depending on the specifics of the particular arrangement involved. The Commission's definition for present purposes must simply ensure that "close collaboration" is not defined so broadly as to allow BOC participation in impermissible manufacturing or research.

sufficiently definitive to foreclose anti-competitive avoidance of the statutory protections.

Respectfully submitted,

Fiona J. Branton
Director, Government Relations
and Regulatory Counsel
Information Technology Industry Council
1250 Eye Street, N.W., Suite 200
Washington, DC 20005
202-626-5751

Colleen Boothby
Janine F. Goodman
Levine, Blaszak, Block & Boothby
1300 Connecticut Avenue, N.W.
Suite 500
Washington, DC 20036-1703
202-223-4980

Counsel for the Information Technology Industry Council

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